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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL HERNANDEZ,

Defendant and Appellant.

2d Crim. No. B209400
(Super. Ct. Nos. VA105004, YA066923)
(Los Angeles County)

Following a jury trial, Manuel Hernandez was convicted of both robbery and grand theft for taking jewelry from a woman at a bus stop, and of resisting arrest. The trial court sentenced him to an aggregate term of 18 years in prison. We reverse the conviction for grand theft person (Pen. Code, § 487, subd. (c)) because that offense is a lesser-included offense of the second degree robbery conviction (§§ 211, 213, subd. (a)(2)).¹ We vacate the sentence and remand the matter to the trial court for resentencing.

Facts

Hernandez approached a woman who was waiting for a bus and asked her if she wanted to go home with him. When the woman ignored him, Hernandez pushed her, grabbed the two gold chains she wore around her neck, and fled. The woman's boyfriend chased Hernandez and held him down until police officers arrived. Hernandez refused to

¹ All statutory references are to the Penal Code.

cooperate with the officers and only stopped resisting once he was handcuffed. The officers found one of the woman's gold chains in Hernandez's pocket.

The jury convicted Hernandez of grand theft person, second degree robbery, and two counts of resisting an officer. (§§ 487, subd. (c), 211, 148, subd. (a)(1).) The trial court sentenced Hernandez to state prison for 18 years, calculated as follows: the upper base term of five years on the second degree robbery count, doubled pursuant to the three strike's law, plus a five-year enhancement for a prior serious felony conviction, plus one year consecutive for each count of resisting an officer, plus one year consecutive for the violation of probation in case No. YA066923. (§§ 213, subd. (a)(2), 667, subd. (a)(1), 1170.12, subds. (a)-(d), 667, subds. (b)-(i).) The trial court sentenced Hernandez to three years on the grand theft count, but stayed the term pursuant to section 654.

Discussion

I.

Hernandez first contends that his grand theft conviction should be reversed because the trial court improperly sentenced him for both robbery and theft for the single act of stealing a woman's jewelry. The Attorney General concedes the error.

A person may not be convicted of both an offense and a lesser-included offense based on the same conduct. (*People v. Ortega* (1998) 19 Cal.4th 686, 699; *People v. Cole* (1982) 31 Cal.3d 568, 582.) Undisputedly, grand theft is a lesser-included offense of robbery, and Hernandez's conviction for grand theft person must be reversed. (*Ortega*, at pp. 694-695.)

II.

Hernandez next contends the trial court erred by using his prior robbery conviction both as an aggravating factor in sentencing him to the upper term on the robbery count and to support the five-year sentence enhancement under section 667, subdivision (a)(1). He further contends that he received ineffective assistance of counsel when his trial attorney failed to object to the dual use of his prior robbery conviction.

At sentencing, the People urged the trial court to impose the upper term for the robbery count, arguing that this was the third documented instance in which Hernandez had "assaulted a young woman." The probation report revealed that, in 2007, Hernandez was convicted of second degree robbery. Although the probation report does not set forth the facts of the robbery, the People informed the court that Hernandez had followed a young girl walking home, pulled her into a parking lot, and took her cell phone. He was placed on probation and ordered to serve 180 days in jail.

Shortly after Hernandez's release from custody, according to the People's sentencing memorandum, he committed a sexual battery against a young woman. (These facts are also not contained in the probation report.) According to the People, this constituted a violation of probation. Hernandez was convicted of one misdemeanor count of lewd conduct and sentenced to 180 days in jail. (§ 647, subd. (a).)

Hernandez was on probation for the prior robbery when he committed the current offenses. The People argued that Hernandez was a serious danger to society based on his pattern of violent conduct towards women, his prior convictions of increasing seriousness, and his prior unsatisfactory performance on probation. The People also noted that his resistance to the police officers in this case showed continued force and violence.

The trial court imposed the upper term for the robbery conviction, stating: "The Court selects this term based on your criminal history of increasing seriousness. It appears to [the] Court that you are a danger to the community."²

To prevail on an ineffective assistance of counsel claim, a defendant must show that his counsel's performance failed to meet an objective standard of reasonableness and that the defendant was prejudiced by such failure. (See *Strickland v. Washington* (1984) 466 U.S. 668, 690-694; *People v. Ledesma* (2006) 39 Cal.4th 641, 745-746.) As Hernandez notes, a prior conviction cannot be used to both enhance a

² The clerk's minute order did not record the court's second finding that Hernandez was a danger to the community. The reporter's transcript controls over any discrepancy in the minute order. (See *People v. Stephenson* (1974) 10 Cal.3d 652, 656.)

sentence under section 667 and to aggravate a sentence above the midterm. (Cal. Rules of Court, rule 4.420(c) & (d); § 1170, subd. (b); *People v. Osband* (1996) 13 Cal.4th 622, 728.) Circumstances in aggravation, however, may be supported by a variety of grounds, including several factors relating to the nature of the crime or the defendant. (Cal. Rules of Court, rule 4.421.) Factors the trial court may consider include, among others, a defendant's "prior convictions . . . are numerous or of increasing seriousness," "violent conduct that indicates a serious danger to society," and whether the defendant was on probation or parole when committing the crime. (*Id.*, rule 4.421(b)(1), (2), (4).)

Here, the trial court selected the upper term because it found that Hernandez had a "criminal history of increasing seriousness" and represented "a danger to the community." Hernandez's prior robbery conviction could not be relied upon to demonstrate the "increasing seriousness" of his crimes. Contrary to the People's contention, the current robbery conviction, along with the prior misdemeanor conviction, also could not be considered to establish a criminal record of increasing seriousness. California Rules of court, rule 4.421(b)(2) refers to a defendant's "prior convictions" being "numerous or of increasing seriousness." By its use of the plural noun "convictions," the rule expressly requires *multiple* prior convictions that are numerous or of increasing seriousness. Thus, a single prior conviction does not qualify under the plain language of the rule. (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 681 ["Two prior convictions . . . are not 'numerous'"].) The cases the People cite involve defendants with *multiple* prior convictions. (See, e.g., *People v. Clark* (1992) 12 Cal.App.4th 663, 665; *People v. Marshall* (1987) 196 Cal.App.3d 1253, 1261.)

The People also argue that even if the trial court had improperly relied on the prior robbery conviction to impose the upper term, reversal would not be warranted because the trial court listed appellant's "danger to the community" as a factor in aggravation. Although a single valid factor in aggravation is sufficient to justify an upper term (see *People v. Osband, supra*, 13 Cal.4th at p. 728), California Rules of Court, rule 4.421(b)(1) requires a finding that the defendant has engaged in "violent" conduct that indicates a "serious" danger to society. Here, the circumstances of the robbery were not

aggravated. Moreover, the trial court's brief comment at sentencing did not mention "violent" conduct or "serious" danger.

The remaining question is whether it is reasonably probable that a more favorable sentence would have been imposed had the trial court explicitly excluded the prior robbery conviction. (*People v. Osband*, *supra*, 13 Cal.4th at p. 728.) The People maintain that the trial court's error was not prejudicial because the court would have reached the same sentence by another route because Hernandez was on probation for robbery when he committed the current, similar offenses. (See Cal. Rules of Court, rule 4.421(b)(4); *People v. Pinion* (1979) 96 Cal.App.3d 904, 911 [nothing prohibits the court "from relying upon the relationship of the prior conviction to the present offense as an aggravating consideration, even where the fact of the offense itself could not be used"].)

On the facts of this case, we are not as sanguine or certain as to what the result would be if we remanded for resentencing. Although Hernandez was on probation at the time of the current offenses, he was only 21 years old, he was not armed, and he did not injure the victim of either the prior or the current robbery. A midterm sentence would have still resulted in a lengthy aggregate sentence of between 11 and 14 years for the "snatch and dash." This depends on whether the trial court decides on remand to impose concurrent or consecutive one-year sentences on the remaining misdemeanor counts and probation violation. (§§ 1170.1, subd. (a), 667, subd. (c).) Under the circumstances here, it is at least reasonably probable the trial court might have imposed a lesser sentence had trial counsel alerted the court to the improper dual use. We can perceive no reason for trial counsel to have not raised this argument. A remand for resentencing is warranted.

Finally, the People correctly contend the trial court should have imposed a \$20 security fee for each of Hernandez's convictions pursuant to section 1465.8, subdivision (a)(1). A review of the abstract of judgment reveals that the trial court imposed only one security fee of \$20. Upon remand, the trial court should impose a security fee of \$60 (\$20 for each of the three remaining convictions).

We reverse the conviction for grand theft person. In all other respects, the judgment is affirmed but we vacate Hernandez's sentence. We remand to the trial court to resentence Hernandez but leave to its discretion what that sentence should be.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Yvonne T. Sanchez, Judge
Superior Court County of Los Angeles

Benjamin Owens, under appointment of the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven E. Mercer and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.